STATE OF MICHIGAN

COURT OF APPEALS

In re ROBERT STOUT REVOCABLE TRUST, ROBERT STOUT TESTAMENTARY TRUST, DOLORES M.A. STOUT TRUST AGREEMENT.

KEVIN STOUT, TRUSTEE,

Respondent-Appellee,

v

TARA ARWOOD, ALISON ARWOOD, and KYLE ARWOOD,

Petitioners-Appellants.

UNPUBLISHED
January 23, 2014

No. 313063
Genesee Probate Court
LC No. 12-192872-TV

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Petitioners, Tara Arwood (Tara), Alison Arwood (Alison), and Kyle Arwood (Kyle), appeal as of right the probate court's October 5, 2012 order denying their petition to remove respondent as trustee, for surcharge of trustee, for trust supervision, and appointment of a successor trustee. Petitioners argue the probate court (1) erred in concluding that the only breach of fiduciary duties consisted of respondent's attempt to sell real property, known as the "River Property," that was to be given to Tara and her sister, Shawn Webster (Shawn), pursuant to the trust terms, (2) erred in concluding that the remainder of the action was frivolous and sanctioning Tara, (3) abused its discretion by awarding attorney fees, (4) abused its discretion by awarding trustee compensation, and (5) abused its discretion by excluding evidence of petitioners' attorney fees. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTS

This case involves three trusts: (1) the Robert Stout Revocable Trust (RS Trust), (2) the Robert Stout Testamentary Trust (RS Testamentary Trust) that was to be created under Robert Stout's Will (RS Will), and (3) the Dolores M.A. Stout Trust (DS Trust). Robert Stout (Robert) and Dolores Stout (Dolores) were married and had three children: Tara—one of the petitioners, Kevin—respondent, and Shawn. Tara had two children, petitioners Alison and Kyle, and Shawn

had two children, Jessica Webster (Jessica) and Shelby Webster (Shelby). Robert was the settlor of the RS Trust and the testator of the RS Will. Robert nominated respondent as the successor trustee. Dolores was the settlor of the DS Trust, and she nominated respondent as the successor trustee. Robert passed away on January 25, 2009, and Dolores passed away on October 9, 2010. Prior to Dolores's death, she was declared incompetent by a court. Robert was initially appointed her guardian, and after his death, Tara was appointed her guardian.

The beneficiaries under the RS Trust are Tara and Shawn, to receive 20 percent of the trust, and Alison, Kyle, Jessica, and Shelby, to receive 15 percent. At the time of trial, Alison and Kyle had only received $9,000, 2.8 percent of the RS Trust, and nothing from the DS Trust. Aside from Tara, Alison, and Kyle, all of the other beneficiaries have received their distributive share of the DS Trust. The RS Testamentary Trust was never created.

The beneficiaries under the DS Trust are Tara, Shawn, and Kevin, to receive 20 percent; Alison, Kyle, Jessica, and Shelby, to receive 10 percent; Eleanor Snead, to receive five percent; and Debra Novak, to receive 2.5 percent. Aside from Tara, Alison, and Kyle, who have received nothing, all of the other beneficiaries have received their distributive share of the DS Trust.

According to Tara, she is still owed $3,600, which was given to Shawn by respondent. Tara also believes her children are owed between $18,000 to $25,000 each.

On March 31, 2011, respondent sent a letter to the beneficiaries, intending to make final distributions and to terminate the trusts, and respondent included a "Receipt and Release Agreement" to release respondent from liability and indemnify him, and the letter indicates that upon a beneficiary's execution of the agreement, his or her scheduled final distributions would be made. Attached to the letter were informal accountings. On September 7, 2011, pursuant to a request by petitioners, respondent sent a second letter and "Receipt and Release Agreement" that contained more detailed accountings.

Petitioners filed their motion to remove the trustee, for surcharge of the trustee, trust supervision, and appointment of a successor trustee on February 10, 2012, alleging that respondent breached various fiduciary duties owed to petitioners that resulted in damages. Respondent then filed a petition to settle the trusts on March 8, 2012. On March 15, 2012, petitioners responded to respondent's petition to settle the trusts, asserting that petitioners were still entitled to distributions from the RS and DS Trusts. In May 2012, the parties agreed to enter mediation.

On June 13, 2012, petitioners filed a petition, which was later amended, to appoint an interim special fiduciary or trustee in light of several alleged transfers from the checking account of the trusts that constituted breaches of respondent's fiduciary duties, which petitioners learned of during discovery. Respondent responded by asserting that he explained these transfers to petitioners, and petitioners had no good faith argument regarding the appropriateness of the transfers. Mediation efforts between the parties failed, and the parties proceeded with a bench trial on September 24, 2012.

In its opinion and order filed October 5, 2012, the probate court found respondent breached his fiduciary duties as trustee when he listed the River Property for sale and awarded

petitioners attorney fees for the related litigation expenses of that breach, but found that the remainder of petitioners' action was frivolous, and (1) sanctioned Tara by ordering her to "forfeit to the estate the sum of $59,398.00, representing the distributions received by her[,]" (2) awarded respondent $3,625.00 in trustee fees to be paid from the trust, (3) awarded respondent "[a]ll attorney fees incurred by [respondent] as a result of this litigation" to be paid from the trust, excluding the costs he incurred as a result of Tara retaining Attorney George Rizik, and (4) ordered that the remaining trust assets be distributed to the remaining beneficiaries—including Kyle and Alison—according to the terms of the trust. Petitioners appeal this order as of right.

II. ANALYSIS

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*, applies in this case because the RS Trust, RS Will, and DS Trust were created, and these proceedings began, after EPIC's effective date of April 1, 2000. See *In re Temple Marital Trust*, 278 Mich App 122, 127-128; 748 NW2d 265 (2008). Where a probate court sits without a jury, we review the probate court's findings of fact for clear error. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994). "A finding is clear error when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id.* However, "[a] reviewing court should treat the trial court's findings with deference in light of its superior ability to assess the credibility of the witnesses." *In re Rosati*, 177 Mich App 1, 4-5; 441 NW2d 30 (1989). We review the language in a will or trust de novo, and the objective of a court in construing a trust is to "give effect to the intent of the settlor." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012) (quotation marks and citation omitted). "Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust." *Id.* We review issues of statutory interpretation de novo. *In re Draves Trust*, 298 Mich App 745, 759; 828 NW2d 83 (2012).

A. FIDUCIARY DUTIES

Petitioners argue that respondent breached various fiduciary duties, and the probate court clearly erred in concluding that the only breach of a fiduciary duty that occurred was when respondent attempted to sell the River Property.

"In general, the duties imposed on the trustee are determined by consideration of the trust, the relevant probate statutes and the relevant case law[,]" and "[a] claimed breach of duty and any resulting liability is tested by the facts of each case." *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). The EPIC includes the Michigan Trust Code (MTC), MCL 700.7101 *et seq*, which governs trusts. Under the EPIC, a trustee, as a fiduciary, owes certain fiduciary duties. MCL 700.1104(e); MCL 700.1212. "The determination of whether a trustee is guilty of . . . violation of its trust duty must be governed by the circumstances of the particular case." *In re Rosati*, 177 Mich App at 5. When a trustee breaches a duty he or she owes to a trust beneficiary, it constitutes a breach of trust. MCL 700.7901(1). "A trustee who commits a breach of trust is liable to the trust beneficiaries affected," in the "amount required to restore the value of the trust property and trust distributions" or the "profit

the trustee made by reason of the breach[,]" whichever is larger. MCL 700.7902. Additionally, there are several remedies a probate court may employ when a breach of trust occurs.[1]

Various fiduciary duties are provided for pursuant to the EPIC and the MTC, and petitioners assert that they presented evidence at trial to prove that respondent breached the following fiduciary duties: (1) the duty of care, MCL 700.1212, (2) the duty to administer the trust in good faith, MCL 700.7801, (3) the duty of loyalty, MCL 700.1212; MCL 700.7802, (4) the duty of impartiality between beneficiaries, MCL 700.1212, (5) the duty to manage and administer the trust pursuant to the trust terms, MCL 700.7801, (6) the duty to maintain adequate records, MCL 700.7811(1), and (7) the duty to inform and report to the beneficiaries, MCL 700.7814.

Nowhere in the probate court's opinion and order did the court find that *only* one breach of fiduciary duties occurred. Instead, the probate court found that respondent breached his fiduciary duties when he listed the River Property for sale, and the probate court discussed other alleged breaches—respondent moving $60,000 out of and back into the trusts' bank account and a mistaken deposit of $9,000 into the trusts' account—and concluded that petitioners and the trusts were not harmed by these incidences. Further, the court indicated that while respondent

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[1] MCL 700.7901(2) provides, "To remedy a breach of trust that has occurred or may occur, the court *may* do any of the following," and lists these remedies:

> (a) Compel the trustee to perform the trustee's duties.
>
> (b) Enjoin the trustee from committing a breach of trust.
>
> (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.
>
> (d) Order a trustee to account.
>
> (e) Appoint a special fiduciary to take possession of the trust property and administer the trust.
>
> (f) Suspend the trustee.
>
> (g) Remove the trustee as provided in section 7706.
>
> (h) Reduce or deny compensation to the trustee.
>
> (i) Subject to section 7912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.
>
> (j) Order any other appropriate relief. [Emphasis added.]

asked petitioners to sign a release, Tara never discussed the release with respondent or asked him if he would waive it. Therefore, the probate court took into consideration other alleged breaches of fiduciary duties, and nothing from the language of the order suggests that the probate court concluded there were no other breaches. Instead, the court found, both explicitly and implicitly, that there were no other breaches of fiduciary duties that *harmed* petitioners and *warranted* a remedy from the court. Therefore, this is the finding that we must review for clear error in light of the alleged breaches.

1. COMMINGLING OF RS TRUST AND DS TRUST ASSETS

Petitioners argue that respondent breached his fiduciary duty of care and duty to manage and administer the trusts according to their terms (1) by commingling the funds of the RS and DS Trusts and (2) by commingling the "AMCAP check" in one or both trusts though it was payable to Dolores while she was alive.

MCL 700.1212(1) provides that "[a] fiduciary shall observe the standard of care described in section 7803[,]" which provides that "[t]he trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule."[2] MCL 700.7803. Pursuant to MCL 700.7801, "the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article."

The RS Trust permitted commingling of assets under certain circumstances:

> If Trustee is holding any trust for the primary benefit of any person or persons for whose primary benefit Trustee is holding any other trust, upon substantially the same terms, which I created by this or any other instrument, or which any other member of my family created, Trustee in its discretion may commingle them and hold them as a single trust.

The RS Trust required the creation of a $200,000 testamentary trust to be funded by the RS Trust if Robert's estate was insufficient to fund the trust, and the DS Trust provided that "first emphasis shall be placed upon the needs, comfort, happiness and well being of the Settlor[,]" Dolores. Therefore, given the terms of the trusts, both were created for the primary benefit of Dolores. Respondent admitted to commingling the funds at trial in order to pay for his mother's care and to make distributions. Respondent testified that after Robert's death, there was $60,000 that could be distributed from the RS Trust after money was set aside for his mother's care, which respondent distributed. Tara received her share of that distribution.

Because both trusts were for the purpose of providing care for Dolores, we cannot agree with petitioners that the varying distribution percentages and beneficiaries between these trusts make the trusts substantially dissimilar. Regardless, evidence was presented at trial that

[2] The terms of the RS Trust exempt a non-corporate trustee from the requirements of Michigan's prudent investor rule.

respondent kept records accounting for the assets belonging to each trust and adjusted his accountings accordingly, which demonstrates petitioners were not harmed by the commingling. Petitioners fail to argue on appeal what remedy the probate court should have employed or what damages respondent is liable for as a result of this alleged breach.

Petitioners also argue that respondent breached his fiduciary duties by commingling a check made payable to Dolores during her lifetime, known as the "AMCAP check," in the same checking account where the RS Trust and DS Trust funds were kept. Petitioners note that this asset was listed in one accounting as a DS Trust asset and in a later accounting as an RS Trust asset. Ultimately, respondent concluded the check belonged in the RS Trust. At trial, respondent explained that there was confusion regarding which trust this check was to be placed into and he "made [his] best effort to try to identify [who] the appropriate beneficiaries were, and then allocate[d] the monies appropriately." Petitioners again fail to argue on appeal what remedy the probate court should have employed or what damages respondent is liable for as a result of this breach. It is particularly difficult to see how petitioners could claim respondent's breach damaged them, given that respondent did not take under the RS Trust and petitioners Alison and Kyle were to receive a higher percentage of the RS Trust—15 percent—than the DS Trust—10 percent.

2. FAILURE TO CREATE A TESTAMENTARY TRUST

Petitioners argue that respondent breached his fiduciary duty to manage and administer the trust according to its terms by failing to create a Testamentary Trust, as required by the terms of the RS Trust and RS Will. Petitioners further contend that respondent did not account for the use of income from the assets verses the use of principal for the care of Dolores.

The terms of the RS Will state:

> ***Trust for my Spouse.*** If my Spouse survives me, I direct that the residue of my estate . . . shall be held in trust, administered and distributed as follows:
>
> * * *
>
> Trustee may pay to or apply for the benefit of my Spouse part or all of the annual net income and such amounts from the principal of the trust from time to time as Trustee, in its absolute discretion, determines to be reasonable and appropriate under the circumstances, taking into consideration my Spouse's needs, best interests, and welfare . . . .

The terms of the RS Trust state:

> [I]f the personal representative of my estate has insufficient resources to fund a trust for the benefit of my Spouse, according to terms set forth in my will (the "Testamentary Trust"), Trustee shall make a distribution to the trustee of the Testamentary Trust in an amount which, combined with the value of any assets transferred to the trustee of the Testamentary Trust by the personal representative of my estate, will provide for the Testamentary Trust to be funded with Two Hundred Thousand Dollars ($200,000).

Respondent admitted at trial that he did not "technically" fund the Testamentary Trust. However, respondent testified that after his father died, $60,000 of the RS Trust was able to be distributed and the remainder of the money was to be kept in trust until his mother passed away and her affairs had been settled. Therefore, while respondent did not create a separate Testamentary Trust per the terms of the trust, petitioners again fail to explain how respondent setting aside the appropriate amount of money in the same account as the DS Trust funds, and keeping track of those funds separately in a spreadsheet in lieu of creating a separate Testamentary Trust with the funds from the RS Trust, caused petitioners harm for which respondent is liable, or what other remedy the probate court should have employed. Most importantly, petitioners do not allege that more money than was appropriate, pursuant to the terms of the RS Trust, was spent on Dolores' care.[3]

3. FAILURE TO PUBLISH NOTICE TO CREDITORS

Petitioners argue that respondent breached his fiduciary duties when he failed to publish notice to creditors, as required by the terms of the RS Trust[4] and MCL 700.7608.[5] Petitioners correctly point out that respondent admitted at trial that he did not publish notice to creditors with regard to the RS Trust, and respondent admitted there was an outstanding claim involving an overpayment for healthcare reimbursement expenses from Chrysler. A document attached to respondent's trial brief indicates that the Chrysler overpayment is in the amount of $1,182. Respondent testified that he paid all outstanding bills aside from the Chrysler overpayment, which he was unable to resolve with Chrysler because he was not Dolores's legal guardian. While it is clear from respondent's testimony that he failed to publish notice to creditors as he was required to do, petitioners fail to argue on appeal what remedy the probate court should have employed or what damages respondent is liable for as a result of this breach.

4. FAILURE TO DISTRIBUTE TRUST ASSETS PURSUANT TO THE TRUST TERMS

Petitioners next argue that respondent's (1) failure to distribute petitioners' full distributive shares from the RS and DS Trusts because petitioners refused to sign the release respondent required as a condition to distribution and (2) payment of $3,600 to Shawn that was owed to Tara constituted breaches of respondent's fiduciary duty of loyalty, duty to manage and administer the trusts according to their terms, duty to inform and report, and duty of care.

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[3] Moreover, the "Agreement to Alter Shares" attached to petitioners' Petition to Remove Trustee indicates that the beneficiaries agreed to increase the amount held from the RS Trust to pay for Dolores' care, which was more expensive than originally envisioned under the Trust, and that respondent would distribute the remaining $60,000.

[4] The RS Trust provides: "If no personal representative of my estate has been appointed so that the publication and notice requirements with respect to creditors have not been discharged, then Trustee shall publish and serve notice to all creditors in the same manner as required for a personal representative."

[5] MCL 700.7608 provides: "If there is no personal representative of the settlor's estate . . . each trustee of a trust . . . shall publish and serve a notice to creditors . . . ."

First, on March 31, 2011, respondent sent the trust beneficiaries a letter regarding final distributions and termination of the RS and DS Trusts. Attached to the letter was a "Receipt and Release Agreement" and an informal accounting of the administration of the trusts. The letter stated, "Upon receipt of your fully executed signature page to the Agreement, the distribution to which you are entitled shall be made within thirty (30) days." The "Receipt and Release Agreement" contained the following provisions:

> In consideration of the foregoing and intending to be legally bound hereby, Trust beneficiaries, as set forth above:
>
> * * *
>
> 4. Do hereby absolutely and irrevocably remise, release, quitclaim and forever discharge KEVIN STOUT . . . of and from any and all actions, reckonings, liabilities, claims and demands relating in any way to his administration of the Trusts;
>
> 5. Do hereby agree to indemnify and hold harmless KEVIN STOUT, his heirs, executors, administrators and assigns, from and against any and all claims, losses, liabilities and damage which he may suffer or to which he may be subjected by reason of his administration of the Trusts and the distribution of the Trusts without an account or the approval of any Court of competent jurisdiction . . . relating in any way to the Trusts up to a maximum amount of the amount of their respective distributions[.]

In a second letter dated September 7, 2011, from respondent to attorney Rizik—Tara's attorney—respondent indicated that Rizik "requested that the monies from the two trusts be displayed separately in the spreadsheets . . . ." Respondent also indicated that he included new spreadsheets that complied with Rizik's request and asked that Rizik inform Tara "that no remaining funds will be distributed to her or her children until I am in receipt of the enclosed Receipt and Release Agreement, signed (and all pages initialed) by Mrs. Arwood, Kyle Arwood, and Alison Arwood."

Unlike statutes in some states,[6] neither the EPIC nor the MTC expressly permit or prohibit a trustee from conditioning a beneficiary's distribution on the signing of a release of liability in favor of a trustee. However, in reviewing the express terms of the trusts along with relevant provisions of the MTC, we conclude that respondent breached his fiduciary duties by failing to administer the RS and DS Trusts in accordance with their terms when he conditioned distribution to certain beneficiaries on the signing of a release and indemnification in favor of respondent because neither trust provided for such conditions on distributions. MCL 700.7801; see also *In re Estate of Butterfield*, 418 Mich 241, 259; 341 NW2d 453 (1983) ("The law is well

[6] See *Bellows v Bellows*, 196 Cal App 4th 505, 510; 125 Cal Rptr 3d 401 (2011) (California statute expressly prohibits a trustee from requiring a beneficiary to sign a release of liability as a condition to receiving a distribution required by the trust).

established that one must look to the trust instrument to determine the powers and duties of the trustees and the settlor's intent regarding the purpose of the trust's creation and its operation.").

Neither trust contains a provision granting broad discretion to the trustee. The RS Trust states, "Trustee shall divide the remaining trust property . . . [,]" and the DS Trust states, "The remainder of the assets of the Unified Credit Trust shall be distributed and/or administered as follows . . . ." Michigan caselaw recognizes that use of the word "shall" connotes a mandatory directive. *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 631; 838 NW2d 183 (2013); *In re Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008). Moreover, MCL 700.7103 defines "discretionary trust provision," providing:

> (d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
>
> (i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
>
> (ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
>
> (iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
>
> (iv) Whether the distribution of trust property is from income or principal or both of the trust.
>
> (v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.

Therefore, the RS and DS Trusts contain mandatory, rather than discretionary, provisions requiring the trustee to distribute to beneficiaries their allotted share.

The MTC allows a beneficiary to release a trustee of liability relating to breaches of trust:

> A trustee is not liable to a trust beneficiary for breach of trust if the trust beneficiary . . . released the trustee from liability for the breach . . . , unless either of the following applies:
>
> (a) The consent, release, or ratification of the trust beneficiary was induced by improper conduct of the trustee.
>
> (b) At the time of the . . . release . . . , the trust beneficiary did not know of 1 or more of the material facts relating to the breach. [MCL 700.7909.]

However, this provision does not, and none of the MTC provisions specifically governing a trustee's powers,[7] give the trustee the authority to require a release as a condition to a beneficiary's receipt of the distribution that he or she is entitled to pursuant to the terms of a trust. Additionally, MCL 700.7821(2), which governs distributions upon termination of a trust, provides: "Upon the occurrence of an event terminating or partially terminating a trust, the trustee *shall proceed expeditiously to distribute* the trust property to the persons *entitled to it*, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, taxes, and expenses . . . ." (Emphasis added.) This provision is followed by a provision that states:

> A release by a trust beneficiary of a trustee from liability for breach of trust is invalid to the extent that either of the following applies:
>
> (a) The release was induced by improper conduct of the trustee.
>
> (b) The trust beneficiary, at the time of the release, did not know of the material facts relating to the breach. [MCL 700.7821(3).]

Therefore, while releases are generally permitted under the MTC, we cannot conclude that these provisions allow a trustee to condition the distribution of trust assets upon the beneficiary signing a release when the beneficiary is entitled to a mandatory distribution under the express terms of the trust. Because petitioners did not receive their full distribution as a result of their refusal to sign the release, the probate court clearly erred in implicitly finding that this action by respondent did not constitute a breach of fiduciary duty that caused harm to petitioners. We find it irrelevant that Tara did not ask respondent to forgo the release, particularly given that respondent made it clear in his September 7, 2011 letter that no further distributions would be made without a signed release.

Second, the $3,600 figure petitioners refer to was provided in an attachment to the September 7, 2011 letter from respondent to Tara's attorney, which indicated that upon signing the release, Tara was to receive from Shawn $3,600. The attachment was a "Schedule of Final Distributions" that provided for "[r]equired [d]istributions from others to be made by the named person within thirty (30) days of execution of the Agreement by the named person[,]" and explained that "various beneficiaries have received excess distributions requiring that they then

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[7] See MCL 700.7816; MCL 700.7817. MCL 700.7817(x) provides: "[A] trustee has all of the following powers: . . . To prosecute, defend, arbitrate, settle, release, compromise, or agree to indemnify an action, claim, or proceeding in any jurisdiction or under an alternative dispute resolution procedure. The trustee may act under this subdivision for the trustee's protection in the performance of the trustee's duties." MCL 700.7817(dd) provides: "[A] trustee has all the following powers: . . . To collect, pay, contest, settle, release, agree to indemnify against, compromise, or abandon a claim of or against the trust, including a claim against the trust by the trustee." While these provisions allow a trustee "to release" for the trustee's own protection in the performance of his or her duties and to release "a claim of or against the trust," these provisions cannot fairly be interpreted as permitting a trustee to require a beneficiary to sign a release as a condition to receipt of his or her distribution.

distribute funds to other beneficiaries who have not received required distributions." While this does indicate that respondent erred in his distribution of trust funds in some respect, it also indicates that respondent was attempting to correct his error contemporaneously with the final distributions and termination of the Trusts. According to Tara, Shawn refused to give Tara the $3,600. The payment of the $3,600 under the terms of the "Receipt and Release Agreement" was conditioned upon Tara signing the agreement; therefore, at the time Shawn denied Tara payment, she was acting pursuant to the terms of the agreement. Therefore, on remand, we direct the probate court to consider this $3,600 in fashioning a remedy for respondent's breaches of fiduciary duties in requiring petitioners to sign a release prior to receipt of their distribution.[8]

5. FAILURE TO PROVIDE FULL AND ACCURATE REPORTS OF THE TRUSTS

Petitioners argue that respondent breached his fiduciary duty to keep the beneficiaries reasonably informed by failing to provide full and accurate reports of the trusts. Additionally, petitioners argue that while respondent did provide some spreadsheets and documentation, these documents inaccurately reported assets, failed to report all transactions, and included "ever-changing information."

MCL 700.7811 provides, in relevant part:

> (1) A trustee shall keep adequate records of the administration of the trust.
>
> * * *
>
> (4) A trustee may do any of the following:
>
> (a) Invest as a whole the property of 2 or more separate trusts, provided the trustee maintains records clearly indicating the respective interests. . . .

MCL 700.7814 provides:

> (1) A trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust.
>
> (2) A trustee shall do all of the following:

[8] We emphasize that the trial court need not find that a remedy is necessary or warranted because of this breach, or any other breach. The most important remedy is to ensure that monies due to petitioners under the trusts are distributed.

> (a) Upon the reasonable request of a trust beneficiary, promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property.
>
> * * *
>
> (3) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified trust beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust property and, if feasible, their respective market values, and, if applicable, any disclosure required under section 7802(5). . . .

While respondent did commingle the RS and DS Trust funds into one account, respondent provided spreadsheets detailing the value of the RS and DS Trusts separately and provided estimates regarding the distributions to each beneficiary on October 14, 2010 and again on December 20, 2010. However, neither of these spreadsheets detailed the expenses paid from the trusts. Respondent testified at trial that he provided these spreadsheets to the beneficiaries prior to any requests made by the beneficiaries. Spreadsheets regarding the value of the RS and DS Trusts separately that *included* detail of expenses paid were provided as an informal accounting, covering the period of February 2009 to November 2010, attached to the March 31, 2011 letter regarding final distributions and termination of the trusts. The subsequent September 7, 2011 letter, in response to petitioners' request that "the two trusts be displayed separately in the spreadsheets," included a more detailed accounting of the March 9, 2009 to May 31, 2011 timeframe. The documents attached to these two letters were the first respondent provided to petitioners that contained transactional details. There was also testimony from Tara and respondent that respondent provided additional documents to beneficiaries via email. Respondent testified that he frequently communicated with the beneficiaries regarding the trusts. However, Tara testified at trial that at the time of trial, she still had not received a complete transactional accounting of all incoming and outgoing transactions for each of the trusts, despite making requests for such an accounting.

Respondent testified that his goal with the reports and accountings was to include all the transactions that *impacted* the accounts, excluding those that did not, such as the $60,000 transfer to his personal checking account that was subsequently returned to the trusts' checking account. Respondent further explained that he transferred the $60,000 into his personal account in order to write checks to beneficiaries because he could not yet write checks from the trusts' account, but later returned the $60,000 when he was advised that he should wait until he could write the checks from the trusts' account.

Regarding the $17,000 payment to respondent for Robert's funeral expenses that was not disclosed to petitioners, petitioners argue that entries in respondent's reports indicate Robert's funeral expense totaled around $14,000, not $17,000. The final accounting provided as an attachment to respondent's trial brief makes note of a "payment" for Robert's funeral expenses that totaled $14,336 and makes no notation of a "reimbursement" to respondent. The handwritten tally of respondent's father's funeral expenses attached to the July 23, 2012 letter

from attorney Douglas Chalgian, respondent's attorney, to attorney Amy DeNise, petitioners' attorney, indicates the expenses totaled $13,716.92. In this same letter, respondent indicates that the $17,000 transfer included "$13.7K" for his father's funeral expenses and "$3.6K" for an advance made to Tara when Tara had insufficient funds to pay her taxes. The letter indicates that respondent has no documentation regarding this $3,600 advance to Tara. At trial, respondent admitted transferring the $17,000 into his personal checking account from the trusts' account to reimburse himself for his father's funeral expenses and the advance to Tara, and indicated the funeral expenses and advance to Tara showed up separately in the accountings and the accountings did not show a $17,000 reimbursement to respondent. Tara admitted that she received a $3,600 advance for property taxes, but would not confirm that it was part of the $17,000. However, Tara indicated that she was not aware whether the check she was given was written from respondent's personal checking account or the checking account for the trusts.

Given the foregoing facts in the record demonstrating respondent's efforts to provide beneficiaries with accurate accountings, we cannot conclude that the probate court clearly erred by implicitly finding that respondent kept adequate records pursuant to MCL 700.7811 and kept the beneficiaries reasonably informed pursuant to MCL 700.7814. Because the reports generated by respondent included details about investments such as IRAs, which by their nature fluctuate, petitioners have not cited any evidence in the lower court record that demonstrates the "ever-changing information" contained in the reports was due to respondent's failures in keeping records, rather than fluctuations in the value of investments.

6. FAILURE TO TREAT BENEFICIARIES IMPARTIALLY

Petitioners argue that by only requiring some, but not all, beneficiaries to sign a release before distribution and failing to provide Tara with the same information as Shawn regarding the River Property, respondent breached his fiduciary duty to treat the beneficiaries impartially.

MCL 700.1212(1) provides, in relevant part, "A fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries . . . ." However, a trustee is not required to treat beneficiaries impartially if "a different intent is clearly expressed in the trust document." *In re Butterfield*, 418 Mich at 257.

First, regarding respondent requiring some, but not all, petitioners to sign a release prior to distributions of shares, we agree with petitioners that this was a breach of respondent's duty to treat beneficiaries impartially. Not only was respondent's requirement that beneficiaries sign the release as a condition to distribution improper because it prevented the distribution of assets in accordance with the terms of the trust, it also only burdened some beneficiaries and not others. However, the harm to petitioners relating to their non-receipt of their distribution is the same for both breaches.

Second, regarding the River Property, Shawn testified that respondent told her he listed the River Property before he told Tara. Regardless, petitioners fail to explain on appeal how this alleged breach of fiduciary duties harmed Tara beyond the amount of her attorney fees to litigate the River Property matter, which the probate court already awarded her.

7. USE OR DISTRIBUTION OF TRUST ASSETS FOR TRUSTEE'S PERSONAL GAIN

Petitioners argue that respondent (1) improperly reimbursed himself from the trusts his expenses accrued for attending his parents' funerals, and failed to disclose this to petitioners and (2) improperly paid himself $10,000 from the RS Trust, to which he was not entitled.

First, regarding the undisclosed expenses for respondent to attend his parents' funerals, respondent's position is that these were proper expenses with regard to the administration of the trusts. MCL 700.7709 provides:

> (1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for both of the following:
>
> (a) Expenses that were properly incurred in the administration of the trust.
>
> (b) To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
>
> (2) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.
>
> (3) Advances and reimbursement under this section are not considered self-dealing by the trustee and are not a breach of the trustee's fiduciary duty.

Additionally, the RS Trust provides that the trustee "shall be entitled to . . . reimbursement for reasonable expenses."

Respondent reimbursed himself a total of $580.00 for the following personal expenses for his mother's funeral: fuel, $38; airfare, $230; lodging, $200; parking, $67; mileage, $45. Respondent reimbursed himself a total of $653.87 for the following personal expenses for his father's funeral: car rental, $150.53; parking, 113.10; fuel, $29.03; supplies, 110.37; food, $252.84.

With respect to his father's funeral, respondent testified at trial that he arrived before his father passed away and decided to stay until the funeral, stating:

> "[I]t was probably a week to ten days, . . . I had to deal with the . . . funeral arrangements, . . . there were some initial decisions that were made but not all of them were made . . . so we—we did deal with those . . . . [B]ecause I didn't [want to] have to come back, I cleared out all of his personal effects from his home. [G]ave my sisters the option of taking whatever they wanted."

While some of respondent's personal expenses during the time frame of his mother's and father's funeral may be fairly considered expenses "incurred in the administration of the trust" in light of this testimony, certainly not all of these expenses are appropriate pursuant to MCL 700.7709, particularly because respondent gave no testimony regarding the relationship between the personal expenses he incurred in relation to Dolores's funeral and the administration of the trust. On remand, we direct the probate court to specifically consider each of these expenses and

whether they were "properly incurred in the administration of the trust" as opposed to expenses incurred merely for attending the respective funerals as the decedents' son. MCL 700.7709.

Second, regarding the $10,000 respondent distributed to himself, respondent testified that he received $10,000 "that came out of [his] mother's. And when all of this was recalculated, um, there [were] small variations in most of the numbers. People were gonna get a little more, or a little less. [T]he person who was entitled to the most additional money out of what was left was me . . . ." When asked if it was paid out of the RS Trust, he then stated, "It was paid from a bank account. I do not remember specifically which bank, or an investment account, I do not remember specifically which account it was paid out of" and answered affirmatively when asked if this was after his mother's death. In the spreadsheets attached to respondent's September 7, 2011 letter, the spreadsheet indicates that respondent received a $10,000 distribution from the RS Trust. Because respondent's testimony provides an explanation for why he was distributed funds from the DS Trust, we cannot conclude that the trial court clearly erred by implicitly finding this was not a breach of fiduciary duties for which respondent is liable.

8. FAILURE TO NOTIFY THE BENEFICIARIES OF HIS DECISION TO CHARGE TRUSTEE COMPENSATION FEES

Petitioners argue that respondent breached his fiduciary duties by failing to provide notice to the beneficiaries that he would be seeking compensation for his services, as is required.

MCL 700.7814 provides, in relevant part:

> (1) A trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. . . .
>
> (2) A trustee shall do all of the following:
>
> * * *
>
> (d) Notify the qualified trust beneficiaries in advance of any change in the method or rate of the trustee's compensation.

The principles governing statutory interpretation are well-established:

> "The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. . . . A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme." [*In re Draves Trust*, 298 Mich App at 760, quoting *McCormick v Carrier*, 487 Mich 180, 191-192, 795 NW2d 517 (2010).]

MCL 700.7814 specifically requires trustees to provide advance notice to beneficiaries of "any change in the method or rate of the trustee's compensation." Because a change from not collecting trustee compensation to requesting compensation constitutes a change in the rate of

the trustee's compensation—from a rate of nothing to the requested rate—respondent had a duty to notify the petitioners in advance. Petitioners correctly point out that respondent, admittedly, did not provide advance notice to petitioners regarding his intent to begin collecting trustee compensation as of the beginning of the instant proceedings. Petitioners first learned that respondent was going to be collecting a trustee's fee as of July 23, 2012, when petitioners received a letter from respondent's attorney that included an accounting including the fees; however, respondent began accounting for his time at the time the parties "proceeded with legal proceedings . . . ." According to the accounting of trustee time attached to respondent's trial brief, respondent began accounting for his time as of May 11, 2011. Therefore, respondent breached his fiduciary duty to keep petitioners reasonably informed about the administration of the trust in this respect, and given that the probate court awarded respondent trustee fees, petitioners were harmed by this breach. Therefore, we vacate the probate court's award of $3,625.00 to respondent as a "fiduciary fee," and direct the probate court to (1) consider whether respondent's trustee fees should be denied pursuant to MCL 700.7904(3) or (2) at a minimum, recalculate the trustee's fee to include only those hours of work incurred after petitioners had notice of respondent's intent to collect his fee.

Moreover, in light of our above conclusions that the probate court clearly erred in finding that some of the breaches of fiduciary duties alleged by petitioners did not cause harm to petitioners, we reverse part B of the probate court's opinion and direct the probate court on remand to determine the appropriate remedy for these breaches pursuant to MCL 700.7901 and MCL 700.7902.

B. EXCLUSION OF EVIDENCE

Petitioners argue that the probate court abused its discretion when it excluded proposed exhibit eight, which was a summary of money paid by Tara on behalf of her children and other expenses that would not have been incurred had the distributive shares been distributed to petitioners, and proposed exhibit nine, which consisted of documents regarding petitioners' attorney billing statements, because both these exhibits were relevant to petitioners' damages. We review for an abuse of discretion the probate court's decision to exclude evidence. *Lima Twp v Bateson*, 302 Mich App 483, 501; 838 NW2d 898 (2013). However, this Court will not reverse on the basis of a harmless error, and an evidentiary error in civil cases is harmless unless failure to disturb the lower court's order is inconsistent with substantial justice. *Guerrero v Smith*, 280 Mich App 647, 655-656; 761 NW2d 723 (2008).

Regarding exhibit eight, respondent's counsel objected to the admission of the document on relevance grounds. "All relevant evidence is admissible[,]" unless otherwise excludable pursuant to the state or federal constitutions or court rules, and "[e]vidence which is not relevant is not admissible." MRE 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

The documents included information about interest on student loans for Alison and Kyle, money spent on a Malibu for Alison, and dental work for Alison. Respondent's counsel objected to the admission of this evidence on relevance grounds. Petitioners' counsel argued at trial that the documents were relevant to prove "damages that [Tara has] incurred because . . . [Tara,

Alison, and Kyle] did not receive their distributive share." The probate court ruled that the document was not going to be admitted, but stated, "I understand what you're proposing for it to be. . . . But in the form that it's offered with the testimony that's offered in support of it, I don't know a better way to say it [than] this, it's just too confusing." However, the court stated, "But you'll have an opportunity to clear it up with testimony, or if you wanna offer a different [exhibit] . . . ."

While MRE 403 provides for exclusion of evidence that would lead to "confusion of the issues" or that would "mislea[d] the jury," neither of these circumstances was present in this case. Therefore, the probate court's exclusion of the evidence on the basis that "it's just too confusing" is not supported by the rules of evidence. In any event, we cannot conclude that the probate court abused its discretion by excluding documentation regarding the tuition principal balance, the Malibu, and dental work because these expenses would have been incurred regardless of whether the distribution was made and, thus, are irrelevant. However, we conclude that the probate court did abuse its discretion in excluding documentation regarding the interest accrued on the tuition from the time the disbursement should have been made because this evidence was relevant to calculating petitioners' damages for respondent's failure to disburse petitioners' distribution of the trusts. On remand, to the extent that exhibit eight provided such relevant evidence, we direct the probate court to consider that portion of proposed exhibit eight in fashioning a remedy for respondent's breaches of fiduciary duties.

Regarding exhibit nine, petitioners offered a redacted copy of petitioners' billing statements, which showed the hours incurred and the hourly rate. In voir diring Tara regarding these documents, respondent's attorney indicated he was concerned that, because of the redactions, there was no way to determine whether the fees listed were regarding the present litigation or other matters that the attorney was handling for Tara. Respondent's counsel objected to the admission of the documents. Tara estimated for the probate court that her attorney fees for this litigation totaled $25,000. The probate court excluded the exhibit, but stated, "[B]ut I'll allow her testimony in that she believes it to be about $25,000. If I do award fees, I will ask for written . . . documentation[.]"

While it is again unclear from the transcript the grounds on which the evidence was excluded, given the context of the voir dire, it is clear that respondent was concerned about the relevance of the offered documentation. Because the relevance of the documentation could not be adequately discerned, we cannot conclude that the probate court abused its discretion by excluding the evidence. Further, if any error did occur, it would have been harmless because the probate court indicated it would have subsequently asked for documentation if it concluded such was necessary.

C. SANCTIONS AND ATTORNEY FEES

This Court reviews a probate court's ruling regarding a request for attorney fees for an abuse of discretion, and the probate court's findings of fact that it relied on to reach its decision are reviewed for clear error. *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012). The probate court abuses its discretion when its decision "falls outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citation omitted).

1. MCL 600.2591

Petitioners argue that the probate court abused its discretion by issuing sanctions against respondent pursuant to MCL 600.2591 and clearly erred in its findings in support of the sanction. In its opinion and order, the probate court agreed with petitioners that respondent breached his fiduciary duties as trustee by listing the River Property for sale, but ruled that the remainder of the litigation was frivolous, citing MCL 600.2591. The court found "that petitioners are unable to articulate with clarity what exactly it was that the trustee did wrong. Most of this litigation was senseless and had no legal merit."

Petitioner first argues that the probate court improperly granted sanctions pursuant to MCL 600.2591(1) because respondent did not file a proper motion for such sanctions. Respondent did not file a motion pursuant to MCL 600.2591; instead, respondent requested attorney fees in his trial brief because "[t]his litigation was wholly unnecessary [and] without basis . . . ."

MCL 600.2591(1) provides for the award of costs and attorney fees "[u]pon motion of any party" to a prevailing party when a civil action is deemed "frivolous." MCL 600.2591; *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). While the language of MCL 600.2591(1) requires a party to file a motion for sanctions and does not permit a court to sua sponte award sanctions, MCR 2.114(F) does not require a motion and provides: "**Sanctions for Frivolous Claims and Defenses**: In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCR 2.625(A)(2) applies MCL 600.2591, stating, "[I]f the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591(2) provides that "[t]he amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law *or by court rule*, including court costs and reasonable attorney fees." (Emphasis added.) Therefore, MCR 2.114(F) gave the court the authority to impose sanctions without a motion by a party, including reasonable attorney fees. While the probate court did not provide an accurate citation to authority, the probate court possessed the requisite authority pursuant to MCR 2.114(F) to award attorney fees, absent a motion.[9]

Finally, petitioners argue that even if the court had the authority to award sanctions, it clearly erred in determining that respondent was a prevailing party and that the action was frivolous. MCL 600.2591(1) permits the award of attorney fees to "the prevailing party[,]" if the court finds the action was frivolous. *Keinz*, 290 Mich App at 141. However, the language of MCR 2.114(F) contains no "prevailing party" requirement. "This Court will not disturb a [lower] court's finding that a defense was frivolous unless the finding was clearly erroneous. A

[9] For the same reasons, we reject petitioners' argument that the probate court abused its discretion in awarding sanctions pursuant to MCL 600.2591(1) because this statute applies to "civil actions" and the present matter was a "proceeding," not a "civil action." The probate court derived its authority pursuant to MCR 2.114(F), and MCR 5.114 provides that MCR 2.114 applies to probate proceedings. *In re Pitre*, 202 Mich App 241, 243; 508 NW2d 140 (1993).

decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002) (quotation marks and citations omitted). The probate court concluded in this case that the action was frivolous under MCL 600.2591(3)(a)(iii)—"[t]he party's legal position was devoid of arguable legal merit[.]"

However, while some of petitioners' allegations regarding breaches of fiduciary duties failed, the probate court clearly erred in finding that petitioners' action was frivolous because petitioners' legal position was not "devoid of arguable merit." While sanctions can be ordered even if some claims are not found to be frivolous, *In re Costs and Attorney Fees*, 250 Mich App at 104, it is also true that "[t]he mere fact that plaintiffs did not ultimately prevail does not render" the action frivolous, *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). Thus, it is axiomatic that the fact that petitioners did not prevail on *all* arguments within their allegations of breaches of fiduciary duties does not render the action frivolous. Because additional breaches of fiduciary duties existed that were not found by the probate court, we conclude that the probate court clearly erred in concluding that the remainder of the petitioners' action, aside from the River Property issue, was frivolous.

The probate court abused its discretion in imposing sanctions against respondent, and we vacate the $59,398 sanction against Tara. Therefore, we need not reach petitioners' challenge to the amount of the sanctions awarded.

2. MCL 700.7904

Petitioners argue that the probate court abused its discretion by awarding costs and attorney fees to respondent to be paid from the trust pursuant to MCL 700.7904. The probate court cited MCL 700.7904 as authority for its decision to award respondent attorney fees paid from the trust, stating, "this Court 'may award costs and expenses, including reasonable attorney fees . . . to be paid from the trust . . . ."

MCL 700.7904 provides:

> (1) In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including *reasonable* attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.
>
> (2) Subject to subsection (3), if a trustee participates in a civil action or proceeding in good faith, whether successful or not, the trustee is entitled to receive from trust property all expenses and disbursements including *reasonable* attorney fees that the trustee incurs in connection with its participation.
>
> (3) A court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust. [Emphasis added.]

Pursuant to the statute, the probate court acted within its discretion by awarding the trustee costs and reasonable attorney fees, paid from the trust, for his participation in the proceedings. However, given that we conclude respondent breached fiduciary duties not found by the probate

court, we direct the probate court to consider on remand whether the attorney fees in favor of respondent, paid from the trust, should be reduced or denied pursuant to MCL 700.7904(3). We note for the probate court's benefit that respondent testified that at the time respondent made the distributions to Shawn and her children, there were "more than enough" funds to make distributions to Tara, Kyle, and Alison. However, respondent also testified that while there was roughly $37,000 remaining in the trust at the time of trial, there were not sufficient funds to make distributions to Tara, Kyle, and Alison because of "legal fees that need to be paid."

Petitioners also argue that the probate court abused its discretion by awarding respondent "all attorney fees" incurred except for the fees incurred as a result of Tara hiring attorney Rizik because (1) respondent submitted only an invoice summary totaling $29,898.88, rather than attorney billing statements, and (2) respondent failed to present evidence regarding the reasonableness of the rate and hours of attorney fees claimed.

The language of MCL 700.7904 specifically authorizes the award of "*reasonable* attorney fees" to a trustee. (Emphasis added.) "[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them[,]" and "the trial courts have been required to consider the totality of special circumstances applicable to the case at hand." *Smith v Khouri*, 481 Mich 519, 529-530; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). In a plurality opinion, the Michigan Supreme Court has held:

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . . In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . Thereafter, the court should consider the remaining [six] *Wood*/MRPC[10] factors to determine whether an up or down adjustment is appropriate. *Id.* at 530-531 (opinion by TAYLOR, C.J.).

The Court directed that, "in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors." *Id.* at 531 (opinion by TAYLOR, C.J.).

In the present case, petitioners did not challenge the evidence regarding the amount of the attorney fees requested by respondent. Petitioners only asked in their trial brief that respondent "personally pay all legal expenses incurred in this matter[,]" and on direct examination by her own attorney, Tara was asked whether the final accounting attached to respondent's trial brief included "the number of hours spent, or the hourly rate by the attorneys[,]" and she responded negatively. Petitioners' counsel did not make any arguments regarding respondent's request for attorney fees in closing arguments. Respondent argues that petitioners' failure to raise this issue in the probate court waives the issue on appeal.

Our Supreme Court has summarized this state's waiver jurisprudence as follows:

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[10] *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982).

> Michigan generally follows the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a "failure to timely raise an issue waives review of that issue on appeal." [*Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).]

Because respondent testified regarding his attorney fees at trial, and petitioners did not challenge the reasonableness or amount of fees incurred, petitioners' failure to raise this issue below waives this issue on appellate review. *Id.* Moreover, while the probate court did not provide an exact amount for the award of attorney fees, it did award the "fees incurred," not "projected" fees.

D. TRUSTEE COMPENSATION

Petitioners argue the probate court reversibly erred[11] by awarding the trustee fees without considering and making findings regarding the reasonableness of the number of hours awarded and the hourly rate awarded. This Court reviews discretionary decisions of lower courts for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013).

MCL 700.7708 provides that if a trust does "not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." The DS Trust does not provide for trustee compensation, but the RS Trust provides that the trustee "shall be entitled to reasonable compensation for services, and to reimbursement for reasonable expenses." In *Comerica Bank v City of Adrian*, 179 Mich App 712, 724; 446 NW2d 553 (1989), this Court adopted several factors to be considered in determining the reasonableness of a trustee's proposed fee:

> (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and the services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10) the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

It is within the probate court's discretion to determine the weight any factor should be given and to ultimately determine the reasonable compensation, and "the probate court must consider the

[11] While petitioners acknowledge the correct standard of review in their brief—abuse of discretion—petitioners fail to apply this standard, claiming only that the probate court "erred" such that reversal is required.

circumstances of the case in determining which factors are to be given weight." *Id.* However, "the burden of proof is on the claimant to satisfy the court that services rendered were necessary and that charges therefor[e] are reasonable." *Id.* While "a claimant's failure to present records concerning his services is usually weighed against him[,]" the determination of reasonableness is ultimately within the probate court's discretion. *Id.*

Respondent provided the probate court with an admitted document containing items of work performed and an estimated number of hours worked for each item; respondent claimed a total of 119 hours of work at $50 per hour for a total of $5,950.00. Additionally, attached to respondent's trial brief was a document that indicated respondent spent 145 hours preparing for the instant litigation, and at $50 per hour, listed $7,250.00 as the trustee's total fees. Despite respondent's request for $50 per hour, the probate court reduced that figure to $25 per hour, finding the $50 per hour rate "unreasonable." Respondent's itemized list of hours worked and the admitted accounting created by respondent provided sufficient information for the probate court to determine the reasonableness of his fee, and the court's reduction of his requested fee indicates the probate court took these documents into consideration. We find no abuse of discretion in the probate court's conclusion that the reasonable rate is $25 per hour. However, as analyzed above, we vacate the probate court's award of $3,625.00 in trustee fees and direct the probate court to recalculate the fee consistent with this opinion.

We affirm part A of the probate court's opinion and the corresponding award of attorney fees to Tara, reverse part B of the opinion, vacate the $59,398 sanction against Tara, vacate the award of fiduciary fees, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs to either party, neither side having prevailed in full. MCR 7.219(A).

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra